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85-374

Supreme Court, U.S.
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NO. ~~84-1663~~

In The

Supreme Court of the United States

OCTOBER TERM, 1985

Leara Denson, *Petitioner*

v.

Department of Health and Human Services
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

JURISDICTIONAL STATEMENT

SUPPLEMENTAL BRIEF CITING NEW CASES

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Pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States. The petitioner respectfully requests that the Court consider the findings in the two cases cited below, if the petition for Writ of Certiorari is granted.

1. Cleveland Board of Education v. Loudermill 84 L Ed 2d 494.

2. Special Counsel v. Charles O. Starrett, Jr., Paul Evans, Arlin R. Tueller (June 13, 1985 MSPB) Doc No. HQ12068310022.

In Cleveland Board of Education v. Loudermill 84 L. Ed 2d, 494 this Court held:

> An essential principle of due process is that deprivation of life, liberty, or property 'be proceded by notice and an opportunity for hearing appropriate to the nature of the case.

The nature of the petitioner's case was removal as a reprisal . Based on agency's objections, the presiding official refused to allow the petitioner to develope an affirmative defense of reprisal by refusing to allow any witnesses or evidence of the protected activities.

This Court also held in this case at pages 504 and 505:

> Dismissal for cause will often in-involve factual disputes...Even where the facts are clear, the appropriateness or nesessity of the discharge may not be, in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.

The decisionmakers, Mrs. Aguilar and Mr. Frank, in the removal of the petitioner, were personally aware that the charges brought against her were not true. They had personal knowledge that the violations of the performance standard by the more experienced employees of the accounting section were more numerous and far more flagrant than the minor violations alleged against the petitioner.

Mrs. Aguilar and/or Mr. Frank were the reviewing and approving authority for the work of all the accounting clerks. They did not so much as call the errors of the other employees to their attention for corrections. But, they scrutinized every piece of work that the petitioner did for errors in efforts to justify the removal. This discriminatory enforcement of the performance standard only against the petitioner was called to the decision-makers attention prior to the removal.

They did not reasonably believe that the actions taken against the petitioner was appropriate. They knowingly and willingly brought untrue charges against her.

Justice Brennan, concurring in part and dissenting in part stated:

> As the Court also correctly noted, other cases 'will often involve factual disputes ante at 9, such as allegedly erroneous records or false accusations.... where there exist not just plausible arguments to be made, but also 'substantial disputes in testimonial evidence' due process may well require more than a simple opportunity to argue or deny.
>
> When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony.

Most of the allegations presented to the MSPB in the proposal to remove and the notice of removal are totally contradicted by the alleged substantial evidence submitted by the agency and the testimonial evidence by Mrs. Aguilar. The MSPB nor the Court of Appeals did not see these

contradictions and deceptions.

The petitioner was given notice that she was being detailed out of her position on July 28, 1982, two days prior to being given the proposal to remove. She maintained a desk and personal belongings in the accounting section. In preparing a response to the proposal, the petitioner went back into the accounting section and was looking at some of the records to try to submit contrary evidence. Mrs. Aguilar and Mr. Frank went into an outrage and had her escorted from the section by her supervisor while on detail.

Mr. Frank told her that she had no business there since she was no longer in the section. Any attempt made by the petitioner to support her defense was barred by the agency. The records that she requested under the MSPB discovery procedures were not provided until the morning of the hearing.

Justice Brennan again relied upon the finding of this Court that:

> [I]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

The Merit Systems Protection Board's landmark decision for reprisal in the case of Special Counsel v. Charles O. Starrett, Jr., Paul Evans, Arlin R. Tueller (June 13, 1985 MSPB) Doc No. HQ12068310022, the MSPB followed the accepted rule held by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 45 (1957) at page 18, para 1:

> In appraising the sufficiency of the complaint, we follow of course, the accepted rule that a complaint should not be dimissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

It is verifiable by the records that the petitioner fully met the performance standard of a general accounting clerk,

even though, she was required to perform at a higher level than her more experienced co-workers. Mrs Aguilar stated that she considered the petitioner fully trained in four months at TR 94 (6-7) and TR 144 (10). The other accounting clerks stated at the MSPB hearing that it took them from one to two years to fully learn the job.

The Board relied on "logical inference" of causal connections at page 9, para 3. The Board also held:

> For guidance in assessing penalties in these cases, the Board has adopted the same standards which it requires of an agency in an appellate jurisdiction case. The Board examines the record with a view to balancing the relevant factors which it discussed in Douglas v. Veterans Administration, 5 MSPB 313 (1981).

The petitioner's removal was for no reason than reprisal. The wrongful discharge of her was not an error in judgment, but was done with such malice that supervisors laughed in her face as they

set her up for removal. If the petitioner had been treated in a fair and equitable manner she would have been the last accounting clerk to be removed for performance.

Respectfully submitted,

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In The
Supreme Court
of the United States

October Term 1985

No. 85-374

Leara Denson, Petitioner

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PROOF OF SERVICE

I hereby certify that on this ~~11~~ 15th day of October, 1985 I have served three copies of the foregoing SUPPLEMENTAL BRIEF CITING NEW CASES to the parties addressed below by enclosing copies thereof in an envelope, via CERTIFIED MAIL, RETURN RECEIPT REQUESTED:

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Leara Denson, Petitioner
October ~~11~~ 15, 1985